BRIEF FOR PETITIONER.

May it Please the Court:

A concise statement of the case and a statement of the grounds on which the jurisdiction of this court is invoked have already been made in the petition for writ of certiorari and reference thereto is respectfully made.

The opinion of the Circuit Court of Appeals has been published in Volume 125 Federal Reporter, Second Series, page 340.

ARGUMENT.

There was no substantial evidence to sustain any of the findings of the Board of Tax Appeals, except possibly the finding that the petitioner obtained $50,000 ransom money in connection with the kidnapping of Fitchie (R. 195, 196). As to all other items of alleged income the testimony of the petitioner and other witnesses stood uncontradicted and the respondent was unable to prove any of his contentions, but was obliged to rely upon suspicions and groundless insinuations to the effect that the petitioner had possibly not paid all income tax due from him.

The record shows that a police officer testified that, "Murray Humphreys' general reputation in the community here in 1930 and 1931 was that of a gangster and a racketeer; he still has that reputation" (R. 284). Whether petitioner was a gangster, or not, could have no bearing on such questions as whether he was the owner of a particular account in a bank, etc. There was no jury present and it might be presumed that the admission of such irrelevant evidence would not affect the Court and would, therefore, do no harm. But the Circuit Court of Appeals,

upon the authority of *Capone* v. *United States,* 51 F. (2d) 609, held that the evidence was competent (R. 413) and even that it was controlling (R. 411). If the court was in error in this regard, it follows that due consideration was not given to the evidence. The respondent, aided by presumptions based upon the evidence that the petitioner was a gangster, was able to overcome sworn testimony favoring the petitioner, so that it was useless for the petitioner to contest the claims of the respondent at all.

It is submitted that the Circuit Court of Appeals misapprehended the purport of the decision in *Capone* v. *United States,* 51 F. (2) 609. In that case the defendant, Capone, offered to compromise his liability for not paying taxes by paying to the government a less sum than was due. He professed to be unable to pay anything more than he offered. The court said (page 619, bottom of first column):

> "Appellant stated in his offer of compromise and in his various efforts to secure a settlement of the taxes due the government for a sum less than the full amount that he was a professional gambler whose property had all been lost; that his only assets were a couple of broken-down race horses, and that he was not able to train them for races wherein he might recoup his fortune. He also stated that he had to borrow the $1,000 with which to make the offer in compromise. To disprove these facts, to show that the accused made false and fraudulent representations and to show that his failure to pay his taxes was willful, it was permissible for the government to show that appellant's principal business was trafficking in beer; that the proceeds from the beer business in five or six years exceeded a million and a half dollars, and that at all times he had to his credit, under fictitious names, in various banks, sums far in excess of the amount required to pay his taxes. That such evidence was

> damaging and prejudicial may be conceded, but such fact affords no grounds for its exclusion. It was relevant to the issues presented by the indictments upon which the accused was tried."

In that case the government had to prove that the defendant wilfully refused to pay taxes due from him and had fraudulently misrepresented his ability to pay and to that end the government proved that the defendant had the means to pay what he owed. In the case at bar, the respondent sought to prove that the petitioner had not paid taxes in full upon his income, because having the reputation of being a gangster there was a presumtion that he had a much larger income than he professed to have. There is no legal presumption that gangsters enjoy enormous incomes and seek to avoid paying taxes in full. The conclusions drawn by the court that the petitioner had not paid the taxes due from him in full are based on presumptions improperly drawn from the evidence that the petitioner had the reputation of being a gangster. Such conclusions, being based upon presumptions on presumptions, are not legitimate.

> "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed."
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> *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U. S. 472, 477.

The respondent did not claim in his pleadings that the petitioner did not have any lawful business or that he was not entitled to a business expense deduction on his automobile (R. 37). The absence of any evidence of the various legitimate enterprises in which the petitioner was engaged, did not warrant a refusal to allow him any business expense deductions.

It is further submitted that the burden was on the respondent to disprove the evidence introduced by the petitioner that he had no interest in the Brunswick account and that any presumption that might arise from the failure of respondent to call Leventhal, should be indulged in favor of the petitioner. Since, however, the Board of Tax Appeals declared, in effect, that the failure of the petitioner to produce Leventhal as a witness worked to the disadvantage of the petitioner, it is submitted that it was the duty of the Board to permit the petitioner to produce Leventhal as a witness and that the Circuit Court of Appeals erred in not holding that the Board committed error in denying the motion by the petitioner for leave to call Leventhal.

It is submitted, therefore, that the writ of certiorari should issue for the review of the judgment of the Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner.